

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2004-006

September 30, 2004

MOUNT ROYAL COLLEGE

Review Number 2740

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to records generated by or for Mount Royal College (the “Public Body”) relating to the discussions regarding the sale and lease of Holy Cross Hospital.

Mediation was authorized and the Public Body wrote to the Third Party requesting its views on disclosure. The Third Party disagreed with the position taken by the Public Body and wrote to the Commissioner requesting a review.

The Third Party argued that disclosure of the records would be harmful to its business interests as per section 16 (business interests) of the Act. The Adjudicator determined that the records were not supplied explicitly or implicitly in confidence nor would disclosure be reasonably expected to bring about the consequences envisaged under subsection 16(1)(c) of the Act. The Public Body had cited the applicability of sections 17 (personal privacy) and 27(1) (privileged information) as authority for severing some of the records. However, the Public Body did not make any submissions in this regard. As section 17 is a mandatory provision, the Adjudicator considered its applicability and concluded that disclosure would not be an unreasonable invasion of a third party’s privacy under subsection 17(2)(e) (employment responsibilities). By contrast, section 27 is a discretionary provision and the Adjudicator took the Public Body’s failure to speak to the discretionary exception as acquiescence to the release of the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss.1(s), 1(s)(ii),(iv),16,16(1),16(1)(b), 16(1)(c),16(1)(c)(i), 17,17(2)(e), 17(5),18(1)(b), 27, 27(1),27(1)(b), 67(1), 71(3)(b) and 72(2).

Authorities Cited: AB: Orders 96-003, 96-008, 96-013, 96-017, 97-013, 98-006, 99-008, 99-018 and 2001-020; **B.C.:** Order 01-20; and **ONT.:** Order P-257.

I. BACKGROUND

[para 1] On April 8, 2002, the Applicant made an initial access request to Mount Royal College (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). On April 29, 2002 a revised request was made by the Applicant extending to records generated by or for the Public Body relating to the discussions to sell the Holy Cross Hospital, including the leasing of space at that site by the Public Body.

[para 2] On September 16, 2002, the Public Body provided some records that were responsive to the Applicant’s request, but withheld other records. The Applicant requested a review by this office.

[para 3] Mediation between the Applicant and the Public Body resulted in the release of further responsive records. The remaining records were provided to the Third Party for its opinion regarding disclosure by the Public Body.

[para 4] The Third Party disagreed with the Public Body regarding disclosure and on May 29, 2003 wrote to the Commissioner requesting a review of the Public Body’s decision to disclose the records to the Applicant.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of an executed lease, draft leases, a facilities program, space allocation report and the Public Body’s formal correspondence with the Third Party.

III. PRELIMINARY ISSUES

Preliminary issue # 1: Have all of the affected parties been given the opportunity to respond in this proceeding?

[para 6] The Third Party has raised this issue and submits that the author of the facilities program and space allocation report may be an affected party.

[para 7] In reviewing the records, which consist primarily of floor/site plans and area calculations, it is apparent that they do not contain personal or commercial information of the author. Both records were prepared by the author in a professional capacity for use by the Third Party. They consist of professional work of a type that is routinely submitted to third parties and public authorities. The Third Party has not submitted any evidence regarding this preliminary issue.

[para 8] After reviewing the records and considering the applicability of section 67(1) of the Act, I have concluded that there are no other persons who are affected by the request for review.

Preliminary issue # 2: Should section 18(1)(b) be added as an issue to the inquiry?

[para 9] The submission of the Third Party raised the issue of the applicability of section 18 for the first time. This section gives the head of Public Body discretion to withhold records where disclosure could reasonably be expected to interfere with public safety. In Order 96-008, the Commissioner stated that being responsible for the overall administration of the Act, he was obliged to consider mandatory exceptions to disclosure howsoever raised, although there was not a corresponding obligation to consider discretionary exceptions.

[para 10] The Ontario Privacy Commissioner in Order P-257 has stated that there may be rare occasions when the Commissioner, to preserve the integrity of the legislation it administers, will decide it is necessary to consider the application of a particular section of the Act not raised by a Public Body. These situations could occur where disclosure of a record would affect the rights of an individual or would be inconsistent with the application of a mandatory exception.

[para 11] The present situation is not one of those rare occasions as envisaged by Order P-257 and it is therefore proper that discretion be left to the head of the public body to determine which exceptions, if any, should apply to the records/information. I therefore do not find it necessary to consider whether the discretionary exception of section 18(1) of the Act applies in this situation.

IV. ISSUES

[para 12] There are three issues in this inquiry:

- A. Does section 16 of the Act (business interests) apply to the records/information?
- B. Does section 17 of the Act (personal information) apply to the records/information?

- C. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

V. DISCUSSION OF THE ISSUES

A. Does section 16 of the Act (business interests) apply to the records/information?

[para 13] As the Public Body decided to disclose information to which the Third Party said that section 16 of the Act applied, the burden of proof will be on the Third Party to prove the Applicant has no right of access to the records, as provided by section 71(3)(b) of the Act.

[para 14] The Third Party submits that in accordance with the mandatory exception in section 16(1), the records/information should not be disclosed. Section 16(1) reads:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 15] To fall within section 16(1), the information must satisfy the following three-part test:

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information be reasonably expected to bring about one of the outcomes set out in Section 16(1)(c)?

1. Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

[para 16] At the outset I will deal with the Third Party's submission that the records/information contain trade secrets.

[para 17] "Trade secret" is defined at section 1(s) of the Act as:

- (s) *"trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process*
 - (i) *that is used, or may be used, in business or for any commercial purpose,*
 - (ii) *that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,*
 - (iii) *that is the subject of reasonable efforts to prevent it from becoming generally known, and*
 - (iv) *the disclosure of which would result in significant harm or undue financial loss or gain.*

[para 18] All four elements of this definition must be met before information can be deemed a "trade secret". Bearing in mind the requirement of Order 98-006 that consideration must be given to the content of the record as a whole, I am satisfied that the information contained therein was used for the commercial purpose of leasing property.

[para 19] With regard to the requirement that information derives independent economic value as required by section 1(s)(ii), the Third Party asserts that this is the case. However, the Third Party does not present any evidence to demonstrate this position. The Third Party states that disclosure may benefit others. However, I agree with the position taken by the Privacy Commissioner for B.C. in Order 01-20 ([2001] B.C.I.P.C.D. No.21) that even if this is the case, such a finding does not in itself mean that there is independent economic value in the secrecy of the disputed information. I find therefore that the information has not been shown to have independent value as intended by section 1(s)(ii).

[para 20] Having found that the information does not meet the requirement of section 1(s)(ii), it is not necessary to go further because all four elements of the definition of “trade secret” must be met for section 1(s) to apply.

[para 21] Although I have found that the information contained in the records does not constitute “trade secrets”, I have concluded that the content of the records as a whole deals with a commercial transaction, namely the leasing of property. The records, therefore, would reveal “commercial information” of a third party, that relates to the buying, selling or exchange of merchandise or services. Accordingly, I can proceed to the second part of the test.

2. Was the information supplied, explicitly or implicitly, in confidence?

[para 22] The Third Party supplied the leases and supporting documentation to the Public Body and submits that they did so either explicitly or implicitly in confidence.

[para 23] It should be noted, however, that the Third Party was unable to present any evidence of an explicit statement or agreement with the Public Body concerning the confidentiality of the records/information. There is nothing on the face of the records that would lead me to conclude that the information was supplied explicitly in confidence. The question that therefore must be asked is whether the evidence presented supports a finding that the information was implicitly supplied in confidence by the Third Party.

[para 24] In Order 99-018 the Commissioner stated that to fulfill the confidentiality requirement of what is now section 16(1)(b), a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information that was supplied. To determine whether the expectation was based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information was:

1. Communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. Treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;

3. Not otherwise disclosed or available from sources to which the public has access; or
4. Prepared for a purpose which would not entail disclosure.

[para 25] In support of its position, the Third Party presented in evidence an affidavit from one of its officers containing two facsimile transmittal cover sheets as exhibits and made reference to a registration clause in the executed lease.

[para 26] Regarding the affidavit evidence, the first cover sheet has the phrase “personal and confidential” written in the comment section. The second cover sheet contains a sentence that the message is intended only for the use of the recipient “... and may contain information that is, privileged, confidential and exempt for disclosure under applicable law”. After this statement there is a request that in the event that the message is received in error to telephone and return the original transmission to the sender.

[para 27] From these statements and the nature from which such cover sheets are used, any obligation of confidentiality that would arise would extend only to those documents transmitted and would be confidential in the context that if they were transmitted in error they should be not be examined by third parties. The transmittal sheets cannot be authority for any obligation beyond what is stated.

[para 28] The Third Party further submits that an intention to keep the lease and supporting documents in confidence can be demonstrated by reference to a clause found in the executed lease that prohibits registration of the lease, except by way of caveat. I have reviewed this clause and the context in which it could be used. It prohibits registration on the reasons set out and cannot be taken as a proposition for anything else apart from that.

[para 29] It should also be noted that on examination of the correspondence between the Public Body and Third Party that forms part of the records/information, there is no notation that such correspondence is confidential in nature.

[para 30] The Third Party has submitted no evidence other than the facsimile transmittal cover sheets. In examining the evidence and the records in their entirety, I cannot arrive at any reasonable and objective conclusion that would justify a finding that the records were supplied with a reasonable expectation of confidentiality, nor can I conclude that the records were treated consistently in a manner that indicated a concern for their protection from disclosure prior to being communicated to the Public Body.

[para 31] I therefore find that the information has not been supplied, explicitly or implicitly, in confidence and accordingly the test as set out in section 16(1)(b) has not been met.

3. Could disclosure of the information be reasonably expected to bring about one of the outcomes set out in section 16(1)(c) ?

[para 32] The Third Party has argued that disclosure could reasonably be expected to significantly harm its competitive position and interfere significantly with its negotiating position. The Third Party further states that disclosure would also result in undue financial loss to itself. In essence the Third Party is arguing that disclosure of the records would reasonably be expected to bring about the circumstances described in sub-sections 16(1)(c)(i) and (iii).

[para 33] Order 96-003 sets out the “harm test” that must be met, which would apply to section 16(1):

The evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue. In that Order it was also stated that the Public Body [in that case] must provide evidence of the following:

- (i) that the connection between disclosure of the specific information and the harm that is alleged;
- (ii) how the harm constitutes “damage” or “detriment” to the matter, and
- (iii) whether there is a reasonable expectation that the harm will occur.

[para 34] The Third Party has cited Order 99-008 and Order 97-013 in support of its position. In both Orders there was evidence of the market the third party operated in and the type of harm that could be expected to occur. In Order 99-008 the third party operated in a seasonal market for services and it was accepted that disclosure of the third party rates for the 1998 season could affect its bargaining position for the next season. There was a reasonable expectation that harm would occur if rates were disclosed as the third party had presented evidence that due to a decrease in its revenue during the winter, it was substantially relying on the income it would receive in the upcoming season. In Order 97-013 the market was described by the Public Body as “highly competitive” and harm was expected to result from disclosure, as the Applicant in question was a competitor of the third party.

[para 35] In this instance, the Third Party alleges that disclosure of the records/information may harm its competitive position and future negotiations with existing and prospective tenants. However, there is no evidence presented as to the nature of the market that the Third Party operates in. By its own admission, the Third Party submits its lease deals with a unique and significant institutional tenant, yet no evidence has been led demonstrating how disclosure of the records/information would set a precedent in the market place with regard to other tenants, be they institutional clients or otherwise. Without such evidence, it is difficult to conclude if there would be harm or whether there would be a reasonable expectation that harm would occur.

[para 36] Regarding the argument that disclosure could reasonably be expected to result in undue financial loss, the Commissioner in Order 96-013 stated that the words “result in undue financial loss” should be interpreted to mean that the third party should

provide evidence that tips the “balance of probabilities” scale in its favour. The Third Party, however, has not presented any evidence on this issue.

[para 37] I therefore find that disclosure could not reasonably be expected to bring about one of the outcomes set out in section 16(1)(c) of the Act.

B. Does section 17 of the Act (personal information) apply to the records/information?

[para 38] The Public Body’s submission consists of a one-page letter which is confined to a recital of its position in the review by this office. There are no arguments advanced either in the Public Body’s submission or on the face of the records as to the applicability of section 17. However, as section 17 is a mandatory exception, I must consider its applicability.

[para 39] I note that the personal information consists of the names of individuals and the positions held within the Public Body, which appear solely in the context of the Public Body’s formal communications. In Order 2001-020, the Commissioner found that disclosure of job titles or positions, in general, are not an unreasonable invasion of a third party’s personal privacy as such information falls within the “employment responsibilities” exception of what is now section 17(2)(e) of the Act. I similarly find that disclosure of the job titles would not be an unreasonable invasion of personal privacy by virtue of that section.

[para 40] With regard to the disclosure of the names of individuals, I have considered all the relevant circumstances as required under section 17(5) and have determined that the disclosure of the names would not be an unreasonable invasion of personal privacy of third parties, as those persons were acting in formal, representative capacities. Therefore those names can be disclosed.

C. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

[para 41] Order 96-017 considered the decision-making process a public body must undertake in applying a discretionary exception of the Act such as section 27(1). There is a two-step process consisting of a factual decision, namely, the determination as to whether the information falls within the exception to withhold the information from disclosure, and a discretionary decision, which determines whether the information should nevertheless be disclosed, even if the exception applies.

[para 42] In this instance, even though the Notice of Inquiry set out section 27(1) as an issue, the Public Body has declined to maintain an argument as to the applicability of this section or even to refer to the records to which this section would apply. Furthermore, there is nothing on the face of the records to assist me. It may be the case

that upon considering the factual decision, the Public Body concluded that the information did not fall within the section 27(1) exception and went no further. In any event, I take the lack of a submission to mean that the Public Body no longer wants to avail itself of this discretionary exception and has acquiesced to the release of the records. I find that the Public Body did not properly apply section 27(1) to the records/information.

VI. ORDER

[para 43] I make the following Order under section 72 of the Act.

[para 44] I find that there are no further Affected Parties to this inquiry.

[para 45] I find that section 18 of the Act has no applicability in this inquiry.

[para 46] I find that Section 16 does not apply to the leases and supporting documentation and I order the Public Body to disclose those records to the Applicant.

[para 47] I find that section 17 does not apply to the Public Body's formal communications and I order the Public Body to disclose those records to the Applicant.

[para 48] I find that the Public Body did not properly apply section 27(1) to the records/information.

[para 49] Having found that none of the exemptions apply to the records withheld from the Applicant by the Public Body, I order the Public Body to disclose all of the records to the Applicant.

[para 50] I further order the Public Body to notify me in writing within 50 days of being given a copy of this Order that the Public Body has complied with this Order.

Dave Bell
Adjudicator